SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – FELONY BRANCH

In the Matter of the Search of Information Associated with Facebook Accounts disruptj20, lacymacauley, and legba.carrefour That Is Stored at Premises Controlled by Facebook, Inc.	))))) /	Special Proceeding Nos. 17 CSW 658, 17 CSW 659, and 17 CSW 660 Chief Judge Morin Hearing: 2:15 PM October 13, 2017

CORRECTED MEMORANDUM
OF PROPOSED INTERVENORS DOE 1, DOE 2, AND DOE 3
OPPOSING ENTRY OF AN ORDER GIVING THE GOVERNMENT
ACCESS TO IDENTIFYING INFORMATION
ABOUT INDIVIDUALS WHO ASSOCIATED OR COMMUNICATED WITH
LEGBA CARREFOUR OR LACY MACAULEY ON FACEBOOK
OR "LIKED" THE DISRUPTj20 FACEBOOK PAGE

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Introduction and Summary of Argument

This brief is addressed to a narrow category of the documents that the Government seeks pursuant to its search warrant to Facebook: identifying information about many thousands of Facebook users whose names are contained on the lists of Facebook "friends" of Lacy MacAuley or Legba Carrefour; lists of Facebook users who "liked" the Facebook page of disruptj20; and other documents reflecting communications from third-party Facebook users to any of the three Facebook accounts subject to the search warrant in this case. The holders of the three Facebook accounts in question have asked the Court to quash the search warrants in their entirety; intervenors accept the account-holders' arguments, but do not address that broader question. Instead, in this memorandum, the Doe intervenors address the narrower point that the First Amendment protections for the rights of members of the public to speak and read anonymously, as well as the special protections provided by the D.C Council in creating the special motion to quash, D.C. Code Ann. § 16-5503, require the Court to limit enforcement of the search warrant to avoid disclosure of lists and other documents recording the names of members of the public who have been Facebook friends and Facebook "likers," and to forbid searching all of the Facebook message and Facebook comments provided to the account holders during the period in question. In addition, intervenors question whether probable cause has been shown to search and seize these particular files.

If nothing else, if the Court does not quash the search warrants altogether, intervenors urge the Court to adopt a procedure comparable to the processes adopted by the Court in its recent orders to DreamHost and to the Government, *In re DreamHost*, 2017 WL 4169713 (D.C. Super. Sept. 15, 2017), imposing strict limits and processes of justification before the Government is entitled to gain access to the identifying information of Facebook users who did no more than "like" the DisruptJ20 Facebook page, or become "friends" with one of the two account holders, or send Facebook

messages to the account holders. Such anonymous Facebook users are comparable to the anonymous Internet users whose viewing of the DisruptJ20.org web site was protected after the first round of briefing (when the Government dropped its demand for IP addresses), and whose emails to the addresses on the DisruptJ20.org domains, and whose inclusion on the DisruptJ20 listservs, were the subject of the Court's protection after the second round of briefing in that case. *Id.* The anonymous Facebook users at issue in this motion were equally exercising their First Amendment right to communicate, and their anonymity rights should also be protected.

The Doe intervenors are a Facebook friend of Lacy MacAuley, a Facebook friend of Legba Carrefour, and a Facebook friend of both individuals who also "liked" the DisruptJ20 Facebook page. As argued below, the Court's order enforcing the search warrant should have due regard to the First Amendment protections for the anonymous speech and anonymous reading rights of such members of the public.

In this case, prosecutors working for the Trump Administration seek to take advantage of a prosecution directed at a number of individuals charged with premeditated violence against property and police officers to conduct a raid on a set of electronic files representing communications from members of the public who contacted a web site in the interest of constitutionally-protected peaceful protest activities against the Administration. The Facebook pages, to all public appearances, had nothing to do with plans for rioting or any other form of violence. Rather, the DisruptJ20 page (as viewed on the Internet Archive) provided information about a wide range of activities being organized under the auspices of a number of different organizations, with the stated purpose of disrupting the inauguration of President Donald Trump by permitted demonstrations as well as protests involving "nonviolent direct action." The two individual Facebook account-holders were

identified on the "media" page of the DisruptJ20.org web site as being media contacts for DisruptJ20; the Doe intervenors know of no reason to believe that the Facebook accounts in question promoted involvement in rioting or contain evidence of such planning or activities.

Consequently, the Doe intervenors urge the Court to balance the First Amendment interests of Internet users not involved in the creation of the DisruptJ20 Facebook page, or the individual Facebook pages at issue, against the Government's efforts to investigate the riot and prosecute the rioters, and to deny the government any access to the content of messages to the account holders and, in particular, access to identifying information about those who "liked" content on the pages or established "friend" connections with the individual account-holders. In the alternative, if the Court concludes that the Government has made a sufficient showing of probable cause with respect to some categories of emails, the Court should adopt a modification similar to the approach that it recently adopted with respect to the search warrant to DreamHost under which the Government has access to the content of messages in that category (with any identifying information removed), but must first establish an appropriate search protocol subject to the Court's approval, and then must make a showing that any particular communication it seeks to seize is within the proper scope of the warrant. Only at that stage should the Government be given the opportunity to show to the Court's satisfaction why there is probable cause to believe that information identifying the senders or recipients of specific emails is needed to pursue the Government's prosecution of the individuals who allegedly participated in rioting on January 20, 2017, or who allegedly planned such rioting, and only after that showing should the Government be able to obtain those particular emails and the identifying portions of such documents.

I. Intervenors Question Whether the Government Has Shown Probable Cause to Believe That Facebook Messages or Lists of Facebook Friends or "Likers" Contain Evidence Relevant to Its Riot Investigation or Prosecutions

In the DreamHost search warrant case, the Court opened the affidavit submitted in support of the search warrant application to public scrutiny; that action enabled the Doe intervenors in that case, Does Number 6, 7, and 8, to raise serious questions both about whether probable cause had been shown for the search of the web site files generally, and whether probable cause was established for access to the communications from innocent members of the public as well as their identifying information. The Court was not persuaded by the argument that probable cause was lacking to search the web site itself, but it was persuaded that no probable cause has been shown to seize communications from innocent members of the public and to obtain their identifying information.

The Court has not yet addressed the question, raised by the motion of the Facebook account-holders, whether to open the search warrant affidavit in this case to public scrutiny, but Doe intervenors believe there may well be reason to question whether probable cause was shown here. After all, the search warrant affidavit in the DreamHost case was submitted in July, 2017, five months later than the search warrant application in this case. If the Government was unable to make a viable probable cause showing for searching files pertaining to contacts between DisruptJ20 and members of the public in July, there is little reason to expect that it made a better showing five months before. And although the showing in this case pertained to two individuals as well as DisruptJ20's Facebook page, the only connection of which intervenors are aware between DisruptJ20 and Ms. MacAuley and Mr. Carrefour is that the media page on DisruptJ20.org (as seen on the Internet Archive at https://web.archive.org/web/20170113163033/http://www.disruptj20.org/ media/) shows the two as media contacts for DisruptJ20.

At the very least, Doe intervenors ask the Court to take a fresh look at the probable cause showing in this matter as it did with respect to the outside Internet users in the DreamHost case. But considering that the July 2017 averments in the Pemberton Affidavit have already been made public, and considering as well that the Government conceded in the Court of Appeals (on appeal from the Court's initial ruling forbidding disclosure by Facebook) that its investigation had advanced sufficiently that it no longer needed to conceal its search warrant from the affected account holders in this matter, the Court is urged to conclude that secrecy of the warrant application is no longer required for any legitimate purposes of the Government's investigation, and to open the affidavit to public scrutiny so that the probable cause issue can be resolved pursuant to the adversary process.

II. The First Amendment Bars Enforcement of the Search Warrant to Obtain Facebook Messages, Comments from Members of the Public, and Lists of Facebook Users Who Either "Liked" the DisruptJ20 Facebook Page or Connected as Friends With Either of the Two Individual Accounts.

The First Amendment provides an additional reason why the Government should not be given access to Facebook messages, comments from members of the public, and lists of Facebook users who either "liked" the disruptj20 Facebook page or connected as friends with either of the two individual accounts. Merely providing the Facebook account names of members of the public who posted comments, "liked" the DisruptJ20 page, or "friended" the individual accounts would likely identify the holders of those accounts because Facebook follows a "real name" policy, forbidding users from employing pseudonyms in creating their accounts. Thus, even if there is probable cause to believe that the three account-holders subject to the search warrant were somehow involved in planning for the January 20 riot, the First Amendment rights of the thousands of **other** Facebook account-holders who spoke to them or read what they had to say on Facebook must still be protected

against overweaning snooping by a Government whose leader makes no bones about his intense hostility to the First Amendment. In this regard, the limitations are comparable to the minimization requirements for wiretaps, where the government is required to hang up as soon as it becomes clear that a conversation is about matters not covered by the warrant. *See* United States Attorneys Criminal Resource Manual,¶ 29(G), https://www.justice.gov/usam/criminal- resource-manual-29-electronic-surveillance-title-iii-affidavits.

A. First Amendment Scrutiny Limits Court Orders and Government Investigations That Trench on First Amendment Interests.

Court orders directed at private parties are actions by the Government that are subject to scrutiny under the First Amendment. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). Such scrutiny applies even when the orders are issued at the behest of private parties, whether the orders are awards of damages, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), or injunctive orders that compel private parties to take specific actions on pain of contempt. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971). First Amendment scrutiny is all the more important where the order is sought from a court at the behest of government officials whose actions are themselves subject to the First Amendment's strictures. *NAACP*, 357 U.S. at 460-463; *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

Moreover, it is well-established that government investigations that impinge on First Amendment interests are subject to scrutiny under the First Amendment. *Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539, 544 (1963); *NAACP*, 357 U.S. at 460-462. These cases call for such scrutiny either because demands for information impinge directly on First Amendment rights, or because of the chilling effect that the investigation may have. For example, in *Clark v. Library*

of Congress, 750 F.2d 89 (D.C. Cir. 1984), the D.C. Circuit reversed the dismissal of a claim by an employee of the Library of Congress objecting to the fact that the Library had instigated an FBI full field investigation after it learned that he had attended meetings of the Young Socialists Alliance. Similarly, in *White v. Lee*, 227 F.3d 1214, 1238 (9th Cir. 2000), the Ninth Circuit allowed local critics of a proposed housing project to pursue First Amendment claims against federal housing officials for violating the critics' free speech rights by conducting a lengthy and intrusive investigation into their opposition. *See also ILA Local 1814 v. Waterfront Comm'n of New York Harbor*, 667 F.2d 267, 272 (2d Cir. 1981) (limiting state commission's demand for list of contributors to a political committee); *Donahoe v. Arpaio*, 986 F. Supp. 2d 1091, 1135 (D. Ariz. 2013) (denying summary judgment against civil rights claim alleging a retaliatory law enforcement investigation directed at dissenters); *Alliance to End Repression v. City of Chicago*, 627 F. Supp. 1044, 1050-52 (N.D. Ill. 1985) (allowing First Amendment claims to proceed where local law enforcement infiltrated certain groups and accumulated "an extensive dossier" about an individual); *Paton v. La Prade*, 469 F. Supp. 773 (D.N.J. 1978) (allowing First Amendment claim brought by student over a "mail cover" that led to Government recordation of his name and address as someone who had sent a letter to a socialist group so that he could write a school paper). Once the investigation was found to implicate First Amendment interests, these courts required the government to show that their investigations were justified under a standard of "exacting scrutiny."

Cases from both the D.C. Court of Appeals and federal courts in the District of Columbia apply First Amendment limits to discovery orders in civil proceedings that seek information privileged against production by the First Amendment. In *Zerilli v, Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981), *United States v. Garde*, 673 F. Supp. 604, 607 (D.D.C. 1987), and *Wyoming v*

Department of Agriculture, 208 F.R.D. 449, 454-455 (D.D.C. 2002), local federal courts invoked First Amendment principles to limit discovery into materials protected by the First Amendment, requiring the parties seeking that discovery to show that the discovery they sought was central to their litigation contentions and that they had exhausted alternate means of obtaining the information they needed to advance their cases. *See also Solers v. Doe*, 977 A.2d 941, 956 (D.C. 2009).

Although civil discovery orders trenching on the First Amendment have received the greatest judicial attention, discovery orders in federal criminal investigations have similarly been subjected to First Amendment scrutiny, requiring the government to show "a compelling state interest in the subject matter of the investigation and a sufficient nexus between the information sought and the subject matter of the investigation." *In re Faltico*, 561 F.2d 109, 111 (8th Cir. 1977). *See In re Grand Jury Subp. No. 11116275*, 846 F. Supp. 2d 1, 4 (D.D.C. 2012). A leading case in that line of authority is *Bursey v. United States*, 462 F.2d 1059, 1082 (9th Cir. 1972), where the Ninth Circuit limited a grand jury subpoena issued in the course of an investigation of the Black Panther Party, a political group whose policies included advocacy of violent self-defense of black communities against police intervention. Although the Court of Appeals found that the overall investigation was legitimate, it protected subpoenaed witnesses from having to answer certain questions that trenched too far on protected First Amendment interests and were insufficiently justified by the government's proffered explanation for its investigation. Similarly, when a grand jury investigating the murder of a local youth was used as an excuse to demand information about a local political group, the Fifth Circuit blocked the inquiry: "It would be a sorry day were we to allow a grand jury to delve into the membership, meetings, minutes, organizational structure, funding and political activities of unpopular organizations on the pretext that their members might have some information relevant to

a crime." *Ealy v. Littlejohn*, 569 F.2d 219, 229 (5th Cir. 1978). *See also Rich v. City of Jacksonville*, 2010 WL 4403095, at *11 (M.D. Fla. Mar. 31, 2010) (local law enforcement official who used subpoena power to identify anonymous blogger without having evidence of a crime denied qualified immunity in action for violation of blogger's First Amendment rights). Cases decided in federal courts in the District of Columbia have similarly limited grand jury investigations into protected First Amendment activity. *See In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.*, 706 F. Supp. 2d 11, 20 (D.D.C. 2009), and *In re Grand Jury Subpoena to Kramerbooks & Afterwords*, Inc., Nos. 98–MC–135–NHJ, 26 Med. L. Rptr. 1599, 1600 (D.D.C. Apr. 6, 1998).

B. The First Amendment Limits Court Orders That Trench on the Right to Speak and Read Anonymously.

The search warrant in this case unduly intrudes into both the right to speak anonymously and the right to read anonymously.

First, following the many Supreme Court cases in which the First Amendment has been held to protect the right of authors to publish anonymously, *e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995), in *Solers v. Doe*, 977 A.2d 941, 956 (D.C. 2009), and *Doe No. 1 v Burke*, 91 A.3d 1031 (D.C. 2014), the D.C. Court of Appeals has held that discovery orders seeking to pierce the right of Internet users to speak anonymously must be justified by an evidentiary showing that establishes a prima facie case that the Internet users sought to be identified have engaged in actionable speech. In this regard, the Court of Appeals embraced an approach now joined by appellate courts in a dozen states. *E.g.*, *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009); *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 170 P.3d 712, 717 (Ariz. App. 2007); *Doe*

v. Cahill, 884 A.2d 451, 456 (Del. 2005). Indeed, in *Doe v. Burke*, the Court of Appeals noted that the D.C. Council had provided statutory recognition for the importance of the First Amendment right to speak anonymously by adopting a special statutory procedure for quashing discovery sought to identify anonymous speakers, requiring a showing of wrongdoing before such discovery may be enforced. Nothing in that statute, D.C. Code Ann. § 16-5503, expressly limits its scope to discovery sought in civil actions.

Moreover, it is "well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). This right "follows ineluctably from the **sender's** First Amendment right," and "[m]ore importantly, . . . is a necessary predicate to the **recipient's** meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (emphases in original). As Justice Brennan stated in his concurrence in *Lamont v. Postmaster General*, "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *see also Reno v. ACLU*, 521 U.S. 844, 874 (1997) (invalidating provisions of law that "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and to address to one another").

Just as the First Amendment right to speak includes the right to speak anonymously and provides protection against discovery, as discussed above, state and federal courts have recognized the right to read anonymously and have, accordingly, refused to enforce discovery demands for the identification of readers when not supported by a compelling government interest that was linked

with sufficient precision to the demanded identification. Thus, *Lubin v. Agora*, 389 Md. 1, 882 A.2d 833 (2005), rejected a demand by the Maryland Securities Commissioner for the production of the list of subscribers to a financial newsletter; and *Tattered Cover v. City of Thornton*, 44 P.3d 1044 (Colo. 2002), restrained execution of a search warrant demanding that a bookstore produce customer records showing purchase of a "how to" book about producing drugs.

Two federal court decisions in the District of Columbia have held applied the same principle. When Special Prosecutor Kenneth Starr served a grand jury subpoena on Kramerbooks demanding a list of Monica Lewinsky's purchases, the United States District Court for the District of Columbia recognized the First Amendment implications and demanded an in camera showing of the government's claim of a compelling justification. *In re Grand Jury Subpoena to Kramerbooks & Afterwords*, Inc., Nos. 98–MC–135–NHJ, 26 Med. L. Rptr. 1599, 1600 (D.D.C. Apr. 6, 1998). In another case, that court limited grand jury subpoenas served in support of an investigation that was purportedly directed at obscene materials to seeking the identities of buyers of materials shown to be unprotected by the First Amendment. *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.*, 706 F. Supp. 2d 11, 18 (D.D.C. 2009). The lists of purchasers of expressive works of a sexual nature that were not shown to be outside First Amendment protection were protected against compelled disclosure. *Id.* at 20-21. And a different federal court, *In re Grand Jury Subpoena to Amazon.com Dated Aug. 7, 2006*, 246 F.R.D. 570, 572 (W.D. Wis. 2007), addressed a grand jury subpoena for a list of book buyers, issued in support of an otherwise legitimate investigation into whether a particular seller was engaged in mail or wire fraud. The court quashed the subpoena because of the chilling effect of identifying book buyers who were themselves accused of no wrongdoing to the government without their consent. Instead of ordering production

of the list of buyers, Amazon, which had received the subpoena, was allowed to inform a subset of the customers in question of the investigation and ask them whether they would be willing to communicate with the prosecutors. Only those users who were willing to speak to the government were to have their names provided.

The court explained:

> The subpoena is troubling because it permits the government to peek into the reading habits of specific individuals without their prior knowledge or permission. . . . [I]t is an unsettling and un-American scenario to envision federal agents nosing through the reading lists of law-abiding citizens while hunting for evidence against somebody else. [In an era of pervasive surveillance and politicized Justice Department applying litmus tests,] rational book buyers would have a non-speculative basis to fear that federal prosecutors and law enforcement agents have a secondary political agenda that could come into play when an opportunity presented itself. Undoubtedly a measurable percentage of people who draw such conclusions would abandon online book purchases in order to avoid the possibility of ending up on some sort of perceived "enemies list."

Id. at 572-573.

The right to speak anonymously, the right to read anonymously, and the right to engage in anonymous political association are each implicated here. To the extent that third-party Facebook holders have either placed comments on the timelines of the three Facebook accounts subject to the search warrant, or sent Facebook messages to those accounts, their communications are speech subject to First Amendment protection. The United States Court of Appeals for the Fourth Circuit has held that the act of "liking" a Facebook page or a Facebook posting is a form of speech subject to First Amendment protection. *Bland v. Roberts*, 730 F3d 368, 385-386 (4th Cir. 2013). Moreover, "liking" and "friending" are not just means of expressing approval – they can also serve as a means of subscribing to notifications of additional posting to the "liked" page (or "friended" account) and additional comments to a "liked" posting. Thus, the list of likers and friends is comparable to the

lists or buyers or subscribers that were protected against criminal discovery in such cases as *Lubin*, *Tattered Cover*, and *Amazon*. Finally, the lists of friends and likers are also lists of association members that were subject to protection against compelled disclosure in *NAACP v. Alabama*, 357 U.S. at 462, and *Bates v. Little Rock*, 361 U.S. 516 (1960). For all these reasons, the likers, friends. and authors of comments and Facebook messages are all protected against identification by court order absent compelling justification.

C. The Government Has Not Made a Showing of Compelling Need to Identify the Thousands of Facebook Account Holders Who Have Either "Liked" or "Friended" The Three Facebook Accounts at Issue, or to Read Their Comments or Messages to Those Accounts.

The implications of the Court allowing federal prosecutors to compel the identification of the several thousand Facebook account holders who liked or friended the three accounts, or who sent them written communications either through Facebook's messaging procedures or by posting on their pages, are chilling indeed. Although a warrant this broad would be disturbing in any administration, the Doe intervenors have particular reason to be concerned in an administration led by a President who has shown intense intolerance for disagreement and a tendency to lash out with raw language and threats directed at political adversaries. Intrusion into the privacy of so many individuals who associated anonymously with the anti-Trump protest page or with the two individuals who were publicly identified as the media contacts for the protest should not be enforced without a highly exacting showing of the government's need for that information.

The affidavits of the Doe intervenors explain the innocent, constitutionally protected reasons for associating with these three Facebook accounts. Several thousand members of the public "liked" the DisruptJ20 page, whether to express support for the organization of nonviolent protests against

the Trump inauguration, or to have a convenient way to receive notification when new events or changes in existing events were posted, or for both reasons. People who had already developed political connections to the two individual account holders became their Facebook friends as a way of keeping in contact about political matters of common interest. Members of the public who were connected to the pages in question posted comments to initiate discussions about a variety of political issues, and to participate in such discussions. The government has no legitimate basis for gaining access to any of these communications, and no compelling interest in identifying the individuals who engaged in this protected First Amendment activity.

Indeed, the D.C. Court of Appeals has imposed procedural requirements before discovery is allowed to identify anonymous Internet speakers: a trial court "should require reasonable efforts to ensure that the Doe knows of the subpoena and has a chance to oppose it." *Solers v. Doe*, 977 A.2d at 954. So far as counsel for intervenors are aware, neither Facebook nor the account holders have used the contact information that they have for the thousands of account holders who stand to be identified pursuant to the search warrants to give notice of the warrant to the Doe Internet users whose identities stand to be revealed. Although Does 1, 2, and 3 learned of the search warrant without notice from Facebook or the account holders because of the efforts of undersigned counsel, many other Does are likely unaware that their anonymity is threatened. Facebook would have the email addresses that the account holders provided when they signed up for their accounts, and both it, and the account holders, could send Facebook messages to the accounts in question. Until such notice has been given, the Court should not place at risk the anonymity of members of the public

who communicated with the web site.[1]

In the DreamHost search warrant case, the Court expressed concern at oral argument that broad notice can often run counter to the Government's interest in protecting the effectiveness of its investigation. But the Government can no longer make the argument in **this** case that such notice would compromise the effectiveness of its investigation. It originally made that argument, but it withdrew the contention, allegedly because of changed circumstances, to avoid having to defend its stance in the D.C. Court of Appeals. There is no more reason to fear the impact on the government's investigation of notifying all the friends and likers of the three accounts of the threat to their anonymity—except that it might encourage more anonymous individuals to retain counsel and come forward to explain to the Court why they should be protected against compelled identification.

In support of its search warrant in the DreamHost case, the Government relied on a series of cases which, it contended, represent a consensus in favor of the application of a two-step process for the search of electronic information stored on computers or computer servers. Reply in Support of Motion to Show Cause, at 9-11. Pursuant to the two-step process, the Government is allowed to take possession of an entire set of electronic files for the purpose of "searching" them, that is, conducting a review to determine which of the files is relevant to its criminal investigation or prosecution. Through the search process, the Government identifies those electronic documents taken into the government's possession that are actually relevant to the investigation; the theory is that only the relevant files are "seized." But the cases on which the government relies are very different from this

[1] In the interim, while the notice is being sent and the Does are being given time to find their own counsel, the Court might consider appointing counsel ad litem to protect the anonymity interests of the Does other than the three represented by undersigned counsel, as a judge of the United States District Court for the Northern District of Texas did in *Mick Haig Productions v. Doe*, 687 F.3d 649 (5th Cir. 2012).

one. The great majority of the cases involved child pornography investigations, in which courts have had to weigh the privacy interests of files typically stored on the computers of people who are the targets of child pornography investigations against the strong public interest in fighting the scourge of child pornography. A handful of other cases involved investigations of kickback schemes and money laundering, in which the privacy interests at stake were largely commercial. Not one of the Government's cases involved a search of the files connected to a political web site dedicated to opposing, by nonviolent means, the head of the Government whose agents are conducting the search.

The Court should be very cautious about the precedent that its order in this case will set, allowing prosecutors working for a President with a well-documented history of intolerance of political opposition, lack of respect for opponents' free speech rights, and willingness to encourage his supporters to beat up peaceful protesters, to search the electronic files of opposition groups on a minimal showing of probable cause. Particularly in this context, the very fact of searching the entire set of emails sent to a web site putatively promoting nonviolent protest, sweeping into the government's net the identities of people not connected to the web site who did no more than communicate to try to obtain more information or to offer nonviolent support, will inevitably have a serious chilling effect that offends the First Amendment. *See NAACP v. Alabama*, 357 U.S. at 462; *In re Grand Jury Subpoena to Amazon.com Dated Aug. 7, 2006*, 246 F.R.D. 570, 572 (W.D. Wis. 2007).

Finally, even if the Court adheres to the "two-step" process instead of denying discovery altogether, it should, as it did in the DreamHost case, use an enhanced version of the two-step process. That is, Facebook should be directed to provide access to the records of the three accounts with identifying information about other Facebook account holders redacted. The Government

should be required to provide the Court with a search protocol for reviewing communications between the three account holders here and members of the public, and to refrain from searching those communications until the Court has approved the search protocol. Then, after conducting the search, the Government should be required to present a statement of reasons why each communication with someone who is NOT one of these three account-holders is within the scope of the warrant. And only at that stage should the Government be given an opportunity to make a showing of its need for identifying information with respect to the sender or recipient of a given communication.

CONCLUSION

The Court's order should exclude identifying information about members of the public who communicated with the three Facebook accounts—whether by "liking," "friending," messaging or posting comments on an account's timeline—from the data to be provided by Facebook to the Government pursuant to the warrant. It should also exclude the substance of such communications unless the Court concludes that probable cause has been established for those documents. To the extent that the Court does not exclude those classes of documents from the warrant entirely, it should adopt the enhanced two-step process allowing a search of those documents as proposed in the foregoing brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of October, 2017, I am both mailing and emailing copies of this motion o counsel for the Government, for the account-holder intervenors, and for Facebook.

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